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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN WALKER,

Plaintiff

vs.

CITY OF HAYWARD; OFFICER ART
THOMS, OFFICER SCOTT LUNGER, and
OFFICER ZACHARY HOYER, individually
and in their official capacities; AMERICAN
DISCOUNT SECURITY; and DAUD
WARDAK aka DAVID WARDAK,

Defendants.

Case Number: C07-06205 TEH

**PLAINTIFF KEVIN WALKER'S
OPPOSITION TO DEFENDANTS
AMERICAN DISCOUNT SECURITY
AND DAUD WARDAK'S MOTION TO
DISMISS FOR FAILURE TO STATE A
CLAIM**

Date: March 3, 2008

Time: 10:00 a.m.

Ctrm: 12

Judge: Hon. Thelton E. Henderson

I. INTRODUCTION

Defendants AMERICAN DISCOUNT SECURITY ("ADS") and DAUD WARDAK'S ("WARDAK")' untimely motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure is brought on the grounds that Plaintiff's Complaint fails to allege facts sufficient to state a claim. However, it is settled law that complaints filed in federal court, including complaints brought pursuant 42 U.S.C. section 1983, are subject to the liberal notice pleading requirement. Under the notice pleading requirement, a plaintiff is not required to state a claim

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1 with particularity. All that is required is a brief statement of facts and theories of recovery so as
2 to provide fair notice to a Defendant.

3 Defendants concede that the notice pleading standard applies here, but nonetheless nit
4 pick about the lack of detail in Plaintiff's Complaint. For instance, Defendants claim that
5 Plaintiff has not shown that Defendants acted under color of state law. Defendants state that
6 Plaintiff has failed to "deny that he was trespassing on Jack in the Box property." (Def. Opp. at
7 19-20.) And, Defendants dispute that they breached the statutory duties identified under
8 Plaintiff's negligence cause of action. Indeed a close reading of Defendants' moving papers
9 reveals that Defendants' arguments are better suited for either claims that mandate
10 particularized pleadings or a dispositive motion that may be brought after the parties have had
11 the opportunity to conduct discovery.

12 In short, Defendants' Rule 12(b)(6) motion is without merit. Because the factual
13 allegations in Plaintiff's Complaint support each cause of action against Defendants ADS and
14 WARDAK under the notice pleading standard, the Court should deny Defendants' motion to
15 dismiss.

16 II. ARGUMENT

17 "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely
18 granted." *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.1997); *Rodriguez v.*
19 *California Highway Patrol*, 89 F. Supp. 2d 1131, 1143 (N.D. Cal. 2000). In ruling on a Rule
20 12(b)(6) motion, the court must consider the complaint in the light most favorable to the
21 plaintiff, accept all well-pleaded factual allegations, and determine whether plaintiff can prove
22 any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mutual Insurance*
23 *Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The issue is not whether plaintiff will prevail but
24 whether plaintiff is entitled to offer evidence to support the claims. *Hydrick v. Hunter*, 500
25 F.3d 978, 985 (9th Cir. 2007). Thus, a "suit should not be dismissed if it is possible to
26 hypothesize facts, consistent with the complaint that would make out a claim." *Hearn v. R.J.*
27 *Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1101 (D. Ariz 2003). Further, the liberal notice
28 pleading requirement extends to civil rights cases brought pursuant to 42 U.S.C. section 1983.

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1 *Leatherman v. Tarant County Narcotics and Intelligence and Coordination Unit*, 507 U.S. 163,
2 168-69 (1993).

3 Here, the Court should deny Defendants' motion to dismiss because Plaintiff has alleged
4 sufficient facts under the liberal notice pleading requirement.

5 **A. Defendants' Motion to Dismiss Plaintiff's First and Third Causes of Action**
6 **should be Denied Because Plaintiff has Alleged that Defendants American**
7 **Discount Security and Daud Wardak Acted Under Color of Law.**

8 Defendants' argue for dismissal of Plaintiff's First and Third causes of action on the
9 basis that Plaintiff has not alleged "specific facts which demonstrate that Defendant acted under
10 color of law []." (Def. Opp. at 5:12-13.) Defendants also suggest that relevant case law has
11 established a *per se* rule that a private citizen who makes a citizen's arrest does not act under
12 color of law. (Def. Opp. at 6.) Defendants' challenge, which is based on the argument that
13 their role in connection with Plaintiff's detention, arrest, incarceration and prosecution was
14 peripheral, is not supported by the facts and relevant case law on the topic, including the case
15 relied on by Defendants, *Collins v. Womancare*, 878 F.2d 1145 (9th Cir. 1989).

16 "Action taken by private individuals may be 'under color of state law' where there is
17 'significant' state involvement in the action." *Howerton v. Gabica*, 708 F.2d 380, 382 (9th Cir.
18 1983) (citing *Lugar v. Edmonson Oil*, 457 U.S. 922, 939 (1982)). The United States Supreme
19 Court has articulated four tests to determine whether a private actor's conduct would amount to
20 state action: (1) public function, (2) joint action, (3) state compulsion, and (4) governmental
21 nexus. *Id.* at 383.¹ However, while these four tests provide guidance in identifying state action
22 by private actors, "there is no specific formula for defining state action []." *Melara v. Kennedy*,
23 541 F.2d 802, 805 (9th Cir. 1976). "Only by sifting facts and weighing circumstances can the
24 nonobvious involvement of the State in private conduct be attributed its true significance."

25 *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). Thus, all of the facts and

26 ¹ In this regard, the state action requirement and under color of law requirement in 42 U.S.C.
27 section 1983 are generally treated as equivalent although the United States Supreme Court has
28 not foreclosed the possibility that "it might take less to demonstrate action under color of law
that to demonstrate state action." *Collins*, 876 F.2d at 1148.

1 circumstances must be viewed in their totality. *Howerton*, 708 F.2d at 384.

2 A private party's conduct may be viewed as state action under a joint action theory if
3 the evidence shows that the private party was a willful participant in the challenged activity of
4 the state or its agents. *Collins*, 878 F.2d at 1154. Courts have focused on the following areas of
5 inquiry in deciding whether a private actor making a citizen's arrest acted under color of law:
6 (1) whether the police officer involved conducted an independent investigation; (2) whether the
7 police maintained a policy of neutrality in the dispute; and (3) whether the police provided the
8 impetus for the arrest. *Collins*, 878 F.2d at 1155. *See also Carey v. Continental Airlines*, 823
9 F.2d 1402, 1404 (10th Cir. 1987).

10 In *Collins*, the court held that a citizen's arrest did not constitute state action because the
11 impetus for the arrest came from a private party and not the police; the police refused, after
12 conducting an investigation, to arrest the alleged lawbreakers; and the police maintained a
13 policy of neutrality in the dispute by warning the party making the arrest of potential civil
14 liability. 878 F.2d at 1155. Similarly in *Carey*, the court held that the private actor's conduct
15 did not amount to state action because the police conducted an independent investigation,
16 maintained a policy of neutrality by asking plaintiff to leave, and lawfully arrested plaintiff only
17 after he refused to comply with the police directive to leave the premises. 823 F.2d at 1403-04.

18 Here, Plaintiff has alleged that Defendant WARDAK acted "under color of law and
19 acted in concert and/or conspired with Defendants THOMS, LUNGER and HOYER in
20 violating Plaintiff's rights under federal and state law." (Complaint ¶ 13.) Plaintiff is not
21 required at the pleading stage to state his claim with particularity.² *See McKeever v. Block*, 932
22 F.2d 795, 798 (9th Cir. 1991) ("All that is required are sufficient allegations to put defendants
23 fairly on notice of the claims against them."). Equally importantly, the dispute as to whether
24 Defendants WARDAK and ADS acted under color of law is not ripe for resolution at this stage

25
26 ² *See also Rodriguez*, 89 F. Supp. 2d at 1137 ("While a liberal interpretation of a civil rights
27 complaint may not supply essential elements of the claim that were not initially pled, plaintiff is
28 not expected to plead his evidence or specific factual details not ascertainable in advance of
discovery").

1 of the litigation because the state action inquiry is a fact-based one, and Plaintiff must be given
 2 the opportunity to conduct discovery before the matter is conclusively resolved by the Court.³
 3 *See Burton*, 365 U.S. at 722; *Howerton*, 708 F.2d at 384; *Rodriguez*, 89 F. Supp. 2d at 1137.
 4 *See also Collins*, 878 F.2d at 1146; (state action issue decided by trial court on summary
 5 judgment); *Carey*, 823 F.2d at 1403-04 (trial court ruled on state action issue on summary
 6 judgment).

7 Nonetheless, Plaintiff has also alleged that he was refused service at *Jack in the Box* and
 8 that Defendant WARDAK summoned the police while Plaintiff and his friend were waiting for
 9 their ride. (Complaint ¶¶ 20-22, 28.) Further, Defendant WARDAK arrested Plaintiff
 10 unlawfully in that Plaintiff did not commit a crime in his presence. *See* Penal Code § 837.⁴
 11 Plaintiff was seized by officers of the Hayward Police Department at the behest of Defendant
 12 WARDAK without an independent investigation. Had the officers conducted an investigation
 13 they would have determined that Plaintiff did not, as a matter of law, commit the crime of
 14 trespass as alleged by Defendants. Unlike in *Collins* and *Carey*, the police officers here did not
 15 maintain a policy of neutrality in the dispute. Plaintiff was brutally attacked by the police
 16 officers and suffered injuries, which required medical attention. (Complaint ¶¶ 22-26.) After
 17 taking Plaintiff into custody, Officer, J. Snell of the Hayward Police Department authored a
 18 statement, which Defendant WARDAK adopted by averring that he made a citizen's arrest for
 19 trespass. (Complaint ¶ 28.)

20 The police conduct here, unlike in *Collins* and *Carey*, was inextricably linked to the
 21 wrongful conduct of ADS and WARDAK and resulted in the violation of Plaintiff's civil rights.
 22 Defendants were willful participants here in that they made a citizen's arrest on the basis of
 23 Plaintiff's non-criminal conduct and condoned the police action by adopting the statement
 24 authored by Officer J. Snell, which claimed *inter alia* that Plaintiff had committed the crime of
 25 _____

26 ³ Plaintiff's discovery may, for instance, also show a pattern or practice of arresting subjects at
 27 the location in question without an independent investigation.

28 ⁴ Defendants' contention that Plaintiff was trespassing on their client's premises is merely an
 allegation that is not borne out by the facts in Plaintiff's Complaint and disputed by Plaintiff.

1 trespass. Therefore, Defendants' contention that they were mere spectators and that Plaintiff
 2 cannot, under any factual scenario, show that Defendants acted under color of state law is
 3 simply inaccurate.

4 The Court should deny Defendants' motion and permit Plaintiff to proceed with
 5 discovery and prove-up the material allegations in Plaintiff's complaint.

6 **B. Defendants ADS and Wardak may be Held Liable for Malicious**
 7 **Prosecution Because their Unlawful Conduct Led to Plaintiff's Arrest and**
 8 **Prosecution Under Section 69 of the California Penal Code.**

9 Defendants contend that Plaintiff's Malicious Prosecution cause of action should be
 10 dismissed because Plaintiff did not plead a favorable termination, absence of probable cause to
 11 arrest, and ill will or improper motive on the part of Defendants. (Def. Opp. at 7-8.)
 12 Defendants' arguments lack merit.

13 As a threshold matter, Plaintiff was prosecuted in connection with the incident and was
 14 acquitted of all charges brought against him after a jury trial. (Complaint ¶ 32.) According to
 15 Defendants, however, Plaintiff failed to plead a favorable termination because Plaintiff was not
 16 charged with the crime of trespass by the Alameda County District Attorney's Office. (Def.
 17 Opp. at 7.) Defendants appear to ignore the fact that Plaintiff was prosecuted for resisting a
 18 peace officer in the performance of a lawful duty, a violation of California Penal Code section
 19 69 (hereafter "PC 69"). (Complaint ¶ 29-30.) The discharge of the lawful duty at issue, which
 20 gave rise to the PC 69 charge, arose as a direct consequence of Defendant WARDAK'S arrest
 21 of Plaintiff for the crime of trespass.⁵ In other words, the PC 69 violation was predicated on
 22 Plaintiff's seizure pursuant to Defendant WARDAK'S arrest of Plaintiff for a crime that
 23 Plaintiff did not commit and for conduct, which even by Defendants' rendition of the facts, did
 24 not amount to a crime. Plaintiff has a viable malicious prosecution cause of action against
 25 Defendants WARDAK and ADS because he prevailed in his defense of the PC 69 charge.

26 ⁵ Even assuming the truth of Defendants' version of the facts, Plaintiff did not commit the
 27 crime of trespass because California law does not criminalize theories of general trespass on
 28 commercial premises. Laws prohibiting trespass on commercial premises require specific
 intent driven conduct. *See, e.g.*, Cal. Penal Code § 602(k)

Defendants' argument that probable cause to arrest was established because premises owners have a right to exclude individuals who violate its rules of conduct is a non-starter. (Def. Opp. at 8:12-15.) Probable cause to arrest is governed by Fourth Amendment principles and not by rules of conduct adopted by premises owners. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 8-9 (1968). Moreover, a private citizen may arrest for a misdemeanor criminal offense only if one is actually committed in his or presence. Penal Code § 837 (1).⁶

Here, Defendants arrested Plaintiff without legal justification.⁷

Finally, Defendants incorrectly claim that Plaintiff has not alleged ill will or improper motive. (Def. Opp. at 8.) Paragraph 58 of Plaintiff's Complaint alleges that Defendants acted with malicious intent, which is sufficient under the notice pleading requirement. *See Leatherman*, 507 U.S. at 168-69; *McKeever*, 932 F.2d at 798; *Rodriguez*, 89 F. Supp. 2d at 1137

The Court should deny Defendants' motion to dismiss Plaintiff's cause of action for Malicious Prosecution.

C. Defendants' Unlawful Conduct Justifies the Abuse of Process Cause of Action.

Defendants' argue for dismissal of Plaintiff's Abuse of Process cause of action on the grounds that Plaintiff's criminal prosecution was not the "result of anything commenced by ADS or WARDAK." (Def. Opp. at 9:23-24.) However, Plaintiff's detention, arrest and

⁶ Further, *Marina Point Ltd. v. Wolfson*, 30 Cal. 3d 721, 725-26, (1982), which Defendants cite as relevant authority, inures to Plaintiff's benefit because the dispute there pertained to housing discrimination by a landlord in violation of the Unruh Act, and resolved in favor of the tenants who alleged unlawful discrimination.

⁷ Defendants' contention that Plaintiff conceded that he trespassed on their client's premises is untrue and not borne out by either the facts in Plaintiff's Complaint or the law pertaining to trespass on commercial premises. Moreover, the fact that Plaintiff's Complaint states that he was advised by Defendants that the restaurant was closed for business does not mean that it was in fact closed. (Complaint ¶ 20.) Further, the drive thru window of the restaurant was open for business. (Complaint ¶ 21.) Even assuming the truth of Defendants' version of the facts, Defendants' arrest of Plaintiff for trespass was unlawful because there is no general trespass crime applicable to commercial premises.

1 incarceration were predicated on the unlawful citizen's arrest made by Defendant WARDAK.
 2 As pointed out above, Defendants did not have legal justification to arrest Plaintiff and
 3 contrived a criminal offense, the crime of general trespass on commercial property, to
 4 apprehend Plaintiff.

5 The Court should deny Defendants' motion to dismiss Plaintiff's cause of action for
 6 Abuse of Process.

7 **D. Plaintiff's Negligence Cause of Action Provides Adequate Notice to**
 8 **Defendants.**

9 Defendants' motion to dismiss Plaintiff's negligence cause of action is based on the
 10 argument that Plaintiff failed "to allege any duty on the part of ADS and Wardak" or breach
 11 thereof. Plaintiff, however, listed several duties breached by Defendants. (Complaint ¶¶ 66-
 12 67.) The fact that Defendants dispute that they owed any duty to Plaintiff is not a basis for
 13 dismissal. Defendants' motion to dismiss should be denied.

14 **E. Plaintiff has Stated a Viable Cause of Action for Intentional Infliction of**
 15 **Emotional Distress.**

16 According to Defendants, Plaintiff's cause of action for Intentional Infliction of
 17 Emotional Distress should be dismissed because a citizen's arrest made without probable cause
 18 is not an outrageous act. (Def. Opp. at 11:7-9.) And, to the extent that Defendants' motion to
 19 dismiss is based on the argument that Plaintiff was guilty of the crime of trespass, it is not
 20 supported by the allegations in the Complaint and cannot be supported under any objective
 21 analysis of the law.

22 Defendants accuse Plaintiff of committing, what appears to be, the crime of general
 23 trespass. However, Plaintiff's counsel was unable to locate any provision in the Penal Code
 24 where the crime of general trespass, as loosely described by Defendants in their moving papers,
 25 applied to commercial premises. Assuming that a general trespass statute with respect to
 26 commercial premises is still on the books in California, Defendants should have identified the
 27 specific statutory provision, the material elements of the crime and discussed the relevant facts
 28

1 in support of their argument.

2 Accordingly, Defendant's motion necessarily fails because it is based on a misstatement
3 of the facts and a misguided analysis regarding the criminal nature of Plaintiff's conduct⁸.

4 **F. Defendants Interfered with Plaintiff's Legal Rights by Means of Violence**
5 **and Intimidation.**

6 According to Defendants, they cannot be held liable for a violation of Civil Code
7 section 52.1 as a matter of law because the Complaint does not "allege that ADS or Wardak
8 ever used any threats of violence, intimidation or coercion against Plaintiff."⁹ (Def. Opp. at
9 11:25-26.) Violence means the application of physical force. *People v. Bamba*, 58 Cal.App.4th
10 1113, 1123 (1997).

11 Here, it is undisputed that Plaintiff was seized by officers of the Hayward Police
12 Department consequent to the citizen's arrest by Defendants WARDAK and ADS, and further,
13 Plaintiff was brutally attacked by defendant police officers in the course of that seizure.
14 Plaintiff has further alleged that the named Defendants engaged in joint action. (Complaint ¶¶
15 15, 37.) Because the conduct of Defendants WARDAK and ADS was a proximate cause of
16 Plaintiff's seizure, Defendants WARDAK and ADS may be held liable for Plaintiff's injuries
17 pursuant to section 52.1 of the Civil Code.

18 **G. Plaintiff Requests Leave to Amend should the Court Sustain Defendants'**
19 **Motion in Whole or in Part.**

20 Leave to amend "shall be freely given when justice so requires. Fed. R. Civ. P. 15 (a);
21 *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). Accordingly, Plaintiff
22 requests the opportunity to cure any deficiencies in the pleading should the Court sustain
23 Defendants' motion to dismiss in whole or in part.

24 _____
25 ⁸ As stated elsewhere, Plaintiff disputes Defendants' characterization of the factual allegations
in Plaintiff's Complaint.

26 ⁹ Defendants may be held liable for a violation of Civil Code § 52.1 regardless of whether
27 Defendants acted under color of state law. Further, Section 52.1 of the Civil Code is not
28 limited to hate crimes. *See Winarto v. Toshiba America Electronics Components, Inc.*, 274
F.3d 1276, 1289 (9th Cir. 2001).

Respectfully submitted,

-10-

PROOF OF SERVICE

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I, the undersigned, declare:

I am an active member of the State Bar of California and am not a party to this action.

My business address is: 46 Shattuck Square, #15, Berkeley, CA 94704. On February 11, 2008, I caused to be delivered by e-filing, a copy of:

**PLAINTIFF KEVIN WALKER'S OPPOSITION TO DEFENDANTS AMERICAN
DISCOUNT SECURITY AND DAUD WARDAK'S MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM**

addressed to:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed February 11, 2008, at Berkeley, California.

/s/ Jivaka Candappa
Jivaka Candappa